of inspection and examination", to quote Donaldson M.R. in *Reg.* v. *Lambeth Metropolitan Stipendiary Magistrate, ex parte McComb*[7] at page 561. This in fact has been the practice here even in cases attracting the death penalty. (See *Teo Hock Seng* v. *Public Prosecutor*[8]).

By way of conclusion, let me make a few remarks which will put this judgment and the reasons behind it in perspective. I fully appreciate that entirely different considerations apply in civil actions between parties and in criminal cases where the State proceeds against an accused person. Notwithstanding this, I feel compelled to say that, even if I had jurisdiction, acceding to the applicant's request will be tantamount to introducing, as against the Public Prosecutor but not, be it noted, against an accused, the civil procedure process of discovery which is available between parties in litigation. There is no warrant in legislation or practice in Singapore or anywhere in the Commonwealth for such concept. In the *Raymond Chia* case, the Malaysian Supreme Court put it succinctly and with consummate clarity when the Court at page 434/A said, "The discretion (under section 51(i)) should not however be exercised so as to enable the accused to gain access to materials before the trial as in the case of pre-trial discovery and inspection of documents in a civil proceeding."

*Application dismissed.*

Solicitors: *Murugason & Co.*

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## MALAYSIAN REPORTS

## NATIONAL UNION OF HOTEL, BAR & RESTAURANT WORKERS v. CASUARINA BEACH HOTEL SDN. BHD.

[S.C. (Wan Suleiman, Mohamed Azmi & Hashim Yeop A. Sani S.C.JJ.) February 22, 1984 & December 14, 1985]

[Kuala Lumpur – Federal Court Civil Appeal No. 237 of 1983]

*Administrative law – Certiorari – Award of Industrial Court – Termination of collective agreement – Effect of – Collective agreement to cease binding effect in the absence of continuation or saving clause – Jurisdictional error – Award quashed – Industrial Relations Act, 1967, ss. 14 & 17.*

*Labour Law – Termination of collective agreement – Effect of – Industrial Relations Act, 1967, ss. 14 & 17.*

In this case the parties had entered into a collective agreement effective for three years from June 1, 1975 to May 31, 1978. Article 1(b) of the agreement stipulated that "The agreement shall continue to be in force for a period of three years from the said date and shall continue thereafter unless termination by either party giving three months' notice in writing to re-negotiate but no such notice shall be given before March 1, 1978." Well after the three-year minimum period had passed, the appellant Union decided to re-negotiate with a view to entering into a new collective agreement. For that purpose, the respondent company requested the appellant Union to terminate the agreement as required by article 1(b) which the appellant Union did by giving three months' notice. The terminated agreement *inter alia*, made provision for the company to contribute 12% of the workers' total amount of monthly wages to the Employees Provident Fund, that is, the company should contribute 5% additional contribution to the statutory rates prescribed under the Employees Provident Fund Act. When the agreement was terminated the appellant Union took the view that notwithstanding such termination, the terms and conditions of the agreement including payment of the additional EPF contribution by the company should continue to remain in force until superseded by a new collective agreement. The respondent company took the opposite view and it informed the appellant Union that it would no longer be paying the additional EPF contribution since they were no more bound by the terms of the terminated agreement. The appellant Union lodged a complaint to the Industrial Court alleging non-compliance by the respondent company of article 30 of the 1975 agreement. The Industrial Court presided over by Mr. M. Abraham accepted the appellant company's interpretation of article 1(b) of the agreement and came to the decision that there was no non-compliance by the appellant company, as it was of the view that once the 1975 agreement had been terminated, it ceased to have binding effect on the parties. The appellant union was dissatisfied with the award of the Industrial Court and eventually filed another complaint for non-compliance by the company of various terms other than article 30 of the 1975 agreement. The complaint came up for hearing before another division of the Industrial Court presided over by

Harun J. By means of an oral application, the appellant union successfully re-introduced its complaint on the company's non-compliance with article 30. The Industrial Court agreed with the appellant union's interpretation of article 1(b) and held that the intention of the parties as expressed in article 1(b) was that the terms of the agreement should continue to remain in force until superseded by a new collective agreement and as such there was non-compliance by the respondent company of the various terms including the provision of article 30 on the payment of additional EPF contribution. The respondent company then applied by notice of motion for an order of certiorari to quash the award of the Industrial Court. Abdul Razak J. allowed the respondent company's motion and quashed the award. The appellant union appealed.

**Held**, dismissing the appeal (Hashim Yeop A. Sani S.C.J. dissenting): (1) the termination of the contract as envisaged in article 1(b) of the collective agreement just as the word "termination" in section 14(2) (c) of the Industrial Relations Act 1967, must mean termination pure and simple. There is nothing in section 17 of the Act to suggest that a collective agreement though deemed to be an award cannot be terminated or modified by the parties. Indeed section 14(2) (c) of the Act empowers the parties to prescribe in the collective agreement the procedure for its modification as well as for its termination;

(2) on the true construction of the second part of section 17(2) of the Act, terms not in the agreement cannot be implied in the contract of service but the terms to be implied in the contract which is limited to the subject of rates of wages and conditions of employment shall be in accordance with the collective agreement unless varied by a subsequent agreement or the decision of the court in which event they shall be in accordance with those varied terms;

(3) in the absence of a continuation or saving clause, the collective agreement would cease to have binding effect on the parties once the agreement is terminated;

(4) the Industrial Court in this case had committed a jurisidictional error not only in the narrow and original sense but also in the wider sense by misinterpreting or disregarding the provisions of section 14(2) and section 17(2) of the Act in construing the effect of the termination under article 1(b) of the collective agreement.

*Cases referred to:*

(1) *Anisminic Ltd.* v. *Foreign Compensation Commission* [1969] 2 A.C. 147.
(2) *In re Racal Communications Ltd.* [1980] 3 W.L.R. 181.
(3) *Enesty Sdn. Bhd.* v. *Transport Workers Union & Anor.* [1986] 1 M.L.J. 18.
(4) *Trengganu Bus Co. Sdn. Bhd.* v. *Transport Workers Union* [1983] 1 M.L.J. 393, 396.
(5) *Curtis* v. *Stovin* (1889) 22 Q.B.D. 513.
(6) *Ditcher* v. *Denison* 14 E.R. 718, 723.
(7) *Cowper Essex* v. *The Local Board for Acton* (1889) 14 App. Cas. 153, 169.
(8) *Duport Steels* v. *Sirs* [1980] 1 W.L.R. 142, 157.
(9) *Nothman* v. *Barnet London Borough Council* [1978] 1 W.L.R. 220, 228.
(10) *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.* [1964] M.L.J. 49; [1964] A.C. 993.
(11) *Burn & Co.* v. *Their Employees* A.I.R. 1957 S.C. 38, 43.
(12) *United Engineering Workers Union* v. *Devanayagam* [1967] 2 All E.R. 367.

SUPREME COURT.

*D.P Xavier* for the appellant.

*Sri Ram* (*T.M Varughese* with him) for the respondent.

*Cur. Adv. Vult.*

**Wan Suleiman S.C.J.** : I have had the advantage of considering the judgments of my brethren and I would with respect concur with that of Tan Sri Dato' Haji Mohamed Azmi.

In particular I would say that his construction of sections 14(2) and 17(2) of the Act would be the one I would perforce adopt myself.

We were assured from the Bar that most collective agreements have a "continuation" clause keeping alive the "terminated" agreement until a new one is agreed upon, a negotiating exercise which may take considerable time.

Perhaps the majority judgment will ensure that such a continuation clause becomes a standard provision in all collective agreements.

**Mohamed Azmi S.C.J.**: This appeal arose from the interpretation of article 1 clause (b) of a collective agreement on terms and conditions of employment entered into on December 29, 1975 between the appellant (hereinafter referred to as "the union") and the respondent (hereinafter referred to as "the company"). Under the heading of "PERIOD AND TERMINATION OF AGREEMENT," article 1 is in the following terms:-

"Clause (a) This Agreement shall be effective and in force for three (3) years from June 1, 1975 to May 31, 1978.

Clause (b) The Agreement shall continue to be in force for a period of three (3) years from the said date and shall continue thereafter unless terminated by either party giving three (3) months' notice in writing to re-negotiate but no such notice shall be given before March 1, 1978.

Clause (c) During the period of this Agreement, neither the Company nor the Union shall seek to alter, modify, annul or add to any of its terms whatsoever except by mutual consent or by operation of Law."

There can be no dispute that under article 1(a), the collective agreement must continue in force for a minimum period of three years with effect June 1, 1975 and thereafter article 1(b) made provision for the agreement to continue after the three-year period. In short, it would be binding until either party wishes to re-negotiate in which case such party must first terminate the agreement by giving three months' notice in writing. Under article 1(c) the terms of the agreement cannot be altered or modified during the period when the agreement is still in force "except by mutual consent or by operation of Law." It cannot be challenged that the terms of article 1 are in compliance with section 14(2) of Industrial Relations Act, 1967 which *inter alia* provides:-

"A collective agreement shall set out the terms of the agreement and shall, where appropriate –

(a) name the parties thereto;

(b) specify the period it shall continue in force which shall not be less than three years from the date of commencement of the agreement;

(c) prescribe the procedure for its modification and termination."

Well after the minimum three-year period had passed, the union decided to re-negotiate with a view to entering into a new collective agreement. For that purpose the company requested the union to terminate the agreement as required by article 1(b) which the union did by giving three months' notice *vide* letter dated February 3, 1979. The agreement was thus terminated in May 1979. The crux of the dispute in the present appeal is: what is the legal effect of such termination? Does termination of the agreement mean what it normally means under the general principle of contract as for instance found in the Employment Ordinance 1955 in that all the terms of the agreement would cease to be binding on both parties; or does it mean something else having regard firstly to the words used in the agreement itself and secondly to the provisions of the Industrial Relations Act, 1967 in particular section 17 under which a collective agreement which has been taken cognizance of is deemed to be an award of the Industrial Court and therefore incapable of being terminated by the parties under the terms of the agreement? Before dealing with these questions of law, it is convenient to refer briefly to the facts leading to this appeal.

The terminated 1975 agreement, *inter alia*, made provision under article 30 for the company to contribute every month 12% of the workers' total amount of monthly wages, inclusive of special relief allowance, cost of living allowance and food allowance to Employees Provident Fund, *i.e.* the company should contribute 5% additional contribution to the statutory rates prescribed in the Employees Provident Fund Act. When the 1975 agreement was terminated by the union article 1(b), the union took the view that notwithstanding such termination, the terms and conditions of the agreement including payment of additional EPF contribution by the company under article 30 should continue to remain in force until superseded by a new collective agreement. But the company took the opposite view. On May 17, 1979, the company informed the union by letter that as from May 1979, *i.e.* on expiry of three months' notice, the company would no longer be paying the additional EPF contribution since they were no more bound by the terms of the terminated agreement. In the result, the union lodged a complaint to the Industrial Court under section 56(1) of the Industrial Relations Act, 1967 alleging non-compliance by the company of article 30 of the 1975 agreement. Section 56(1) provides:-

"Any complaint that any term of any award or of any collective agreement which has been taken cognizance of by the Court has not been complied with may be lodged with the Court in writing by any trade union or person bound by such award or agreement."

The complaint came up for hearing on July 26, 1979 in Penang with Mr. M. Abraham presiding. By award No. 5/80 (for convenience, referred to as "Abraham Award"), the Industrial Court accepted the company's interpretation of article 1(b) of the agreement and came to a decision that there was no non-compliance by the company of article 30. The court was of the view that on the construction of article 1(b), once the 1975 agreement had been terminated, it ceased to have binding effect on the parties. As there could not be any non-compliance of a terminated agreement, Abraham Award made no order on the union's complaint. The union was dissatisfied with Abraham Award and filed a Motion in the High Court to quash the said award, but for some reason the Motion was withdrawn. Instead, another complaint was lodged by the union under section 56(1) for non-compliance by the company of various terms other than article 30 in the 1975 agreement. This time the complaint came up for hearing before another Division of the Industrial Court presided by Harun J. By means of oral application, the union successfully re-introduced its complaint on the company's non-compliance with article 30 which had been dealt with earlier in Abraham Award. By Award No. 6/81 (for convenience,

referred to as "Harun Award"), the Industrial Court now agreed with the union's interpretation of article 1(b) and contrary to the decision made in Abraham Award, it was held that the intention of the parties as expressed in article 1(b) was that the terms in that agreement should continue to remain in force until superseded by a new collective agreement and as such there was non-compliance by the company of the various terms including the provision of article 30 on the payment of additional EPF contribution. The company applied by Notice of Motion for an Order of Certiorari to remove into the High Court for the purpose of it being quashed Harun Award handed down on January 5, 1981. In the High Court at Kuala Lumpur, Abdul Razak J. allowed the company's Motion and quashed Harun Award. The learned Judge upheld the interpretation of article 1(b) of the agreement as contained in Abraham Award.

We are persuaded to determine whether Abdul Razak J. was correct in law in holding that the Industrial Court presided by Harun J. had acted in excess of jurisdiction when the effect of Harun Award is to reverse and quash the earlier Abraham award both on the issue of non-compliance of article 30 and as well as on the question of construction of article 1(b) of the 1975 agreement. For this determination, two main questions need to be considered. First, whether the Industrial Court presided by Harun J. had jurisdiction to hear the complaint on non-compliance by the company of article 30; and second, whether the Industrial Court had in Harun Award committed an error of law in construing article 1(b) of the agreement and that by such misinterpretation it had done or failed "to do something in the course of the inquiry which is of such a nature that its decision is a nullity" as referred to by Lord Reid at page 171 in *Anisminic Ltd.* v. *Foreign Compensation Commission*[1] or the court "having asked themselves the wrong question" as referred to by Lord Diplock at page 187 in *In re Racal Communications Ltd.*[2] had rendered its decision a nullity. In proceedings before the Industrial Court a dispute on jurisdiction can occur at two stages. In a complaint under section 56(1) or a reference under section 20 or section 26, a jurisdictional error can occur at the initial stage affecting the complaint or reference itself; and the second occurrence can take place at the final stage affecting the "award" which by virtue of section 2 definition includes any decision or order made by the court under the Act. In *Enesty Sdn. Bhd.* v. *Transport Workers Unions & Anor.*[3] this Court has referred to the first jurisdictional dispute as "jurisdiction in the narrow and original sense" as distinguished from "jurisdiction in the wider sense." The former is jurisdiction to enter on an inquiry and the latter is jurisdiction to hear the complaint or reference on its merits. In the present appeal, whether Harun J. had jurisdiction to hear the same complaint after Mr. Abraham had dealt with it earlier in another Division of the Industrial Court is a jurisdictional dispute in the narrow and original sense. As to whether the interpretation of article 1(b) of the collective agreement made by Mr. Abraham is of the better view than that expressed by Harun J. is a jurisdictional dispute in the wider sense. Since the first dispute would necessarily depend on the outcome of the second dispute, in that if the effect of termination of the collective agreement as determined by Mr. Abraham and upheld by Abdul Razak J. turned out to be the correct interpretation then it must necessarily follow that Harun J. could not have jurisdiction under section 56(1) to hear a complaint of non-compliance with the terms of a non-existent or expired agreement. It should be noted that the basis of the decisions of the two Divisions of the Industrial Court and as well as the order of the High Court on the union's complaint under section 56(1) for non-compliance with the terms of the 1975 collective agreement depended on their interpretation of article 1(b) as to the effect of termination of the agreement. Unfortunately the effect of section 17(2) of the Act was never fully argued either in the Industrial Court or the High Court. It is only before this Court that the matter has been argued with some intensity.

Now, going back to the crux of the dispute in this appeal, Mr. Abraham ruled that once a collective agreement had been terminated under article 1(b), it would cease to have binding effect on the parties; whereas Harun J. held that notwithstanding such termination, the terms of the agreement would nevertheless continue to have effect until such time as the parties have formulated a new collective agreement. Abdul Razak J. agreed with Mr. Abraham's interpretation and in allowing the company's Motion, the learned Judge had this to say at pages 4 to 6 of his judgment:-

"For myself I cannot see how one can seek to extend the meaning of Clause (b) other than what it says in precise terms. The Clause provides that the contract shall cease to have effect after the parties had by three months' notice terminated it. I do not think one can be made to sound any clearer. If it was intended nevertheless that it was to continue to have effect until such time as the parties had formulated a new Agreement as Counsel urged, it is very strange indeed that the parties had not expressly said so in

the Agreement. One would expect them to have said so. It was never said by the parties that this was something which was completely outside their contemplation. I was asked to say also that the Court shall make a purposive approach to the interpretation of Clause (b) so as to ensure harmony among workers thereby preserving industrial peace. But in urging the Court so to do, one is also seeking to give a meaning to a clause which does not exist in the first place. The Court would not merely be interpreting a clause, it would be going outside the limit of the power to interpret seeking to create a new right instead which it has no power to do either expressly or by necessary inplication. A similar situation arose in *Hotel Jaya Puri* v. *The National Union of Hotel, Bar & Restaurant Workers* [1980] 1 M.L.J. 109. There the President in awarding compensation to the workers gave two months' salary and fixed allowances on being discharged or entrenched from their services. There was, however, nowhere provided in the Agreement giving powers to the Court to make such an award. Salleh Abas, F.J. (as he then was) said 'The next point I have to consider is the basis how and why the President gave an award of compensation of two months' salary and fixed allowances against the Hotel (the employer). I tried to find the basis why compensation is paid at all. If there is a legal basis for paying the compensation, the question of amount of course is very much a matter of the discretion which the Industrial Court is fully empowered under section 30 of the Industrial Relations Act to fix but where there is no legal basis for the payment of compensation, I do not think that the President can create legal right and obligation for it and, in my view, the award will be clearly an error in law for which I am prepared to allow this application.' It seems to me to be a matter of some wonder why in our case it was urged that clause (b) would allow the Agreement to be extended and be operative, nevertheless even after the parties had terminated it when this was not expressly provided for, when Clause (c) is a clear reminder to the parties that they should not seek to modify or *add* to any of its terms *whatsoever* except by mutual consent (the emphasis is mine). Clearly, what the respondent is seeking to do is to modify and add to Clause (b) what was not there. If it was so intended as urged, then it must be left unanswered why the agreement had explicitly (unless with consent) prohibited against it in the first place. As I said in the way the President had acted, the case had ceased to be merely a matter of interpretation of the Collective Agreement as envisaged by section 33 for which it was well within the power of the President to act. It has become one where he has allowed himself to go outside the scope of his jurisdiction altogether."

Reading the plain meaning of the words within the four corners of the 1975 collective agreement, I entirely agree with the conclusion of Abdul Razak J. on the interpretation of article 1(b). As indicated by the learned Judge, if the parties had intended that notwithstanding termination, the terms of the agreement would nevertheless continue to have effect until such time as the 1975 collective agreement is replaced by a new agreement, then nothing would be more simpler than by providing a saving clause to that effect in the 1975 agreement. There is no such continuing clause or saving clause in the collective agreement. To agree with Harun J.'s interpretation of article 1(b) as to the effect of termination of the agreement would be tantamount to the High Court rewriting the agreement for the parties. Indeed, before us Mr. Xavier for the union concedes that normally there would be a standard continuation clause in the collective agreement to preserve the terms of the terminated agreement during the period of re-negotiation for a new collective agreement. There is, however, no such clause in the instant case. Mr. Xavier relies on the authority of *Trengganu Bus Company Sdn. Bhd.* v. *Transport Workers Union*[4] for the proposition that it must be implied in any collective agreement that it shall continue even after its expiry date until replaced by a new collective agreement. It is noted that even in that High Court case, the effect of section 17(2) was never seriously canvassed. We must now consider whether such an implication can be drawn from section 17(2). Section 17 is now reproduced:-

"(1) A collective agreement which has been taken cognizance of by the Court shall be deemed to be an award and shall be binding on –

(a) the parties to the agreement including in any case where a party is a trade union of employers, all members of the trade union to whom the agreement relates and their successors, assignees or transferees; and

(b) all workmen who are employed or subsequently employed in the undertaking or part of the undertaking to which the agreement relates.

(2) *As from such date and for such period as may be specified in the collective agreement* it shall be an implied term of the contract between the workmen and employers bound by the agreement that the rates of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with the agreement unless varied by a subsequent agreement or a decision of the Court." (emphasis supplied)

There are two material parts in section 17(2), namely (1) "as from such date and for such period as may be specified in the collective agreement" and (2) "it shall be an implied term of the contract ... that the rates of wages ... and the conditions of employment ... under the contract shall be in accordance with the agreement unless varied by a subsequent agreement or a decision of the court."

Thus, on the true construction of the second part of section 17(2), terms not in the agreement cannot be implied in the contract of service, but the terms to be implied in the contract which is limited to the subject of rates of wages and conditions of employment shall be in accordance with the collective agreement unless varied by a subsequent agreement or a decision of the court in

which event they shall be in accordance with those varied terms. In conjunction with article 1(c) the collective agreement can be altered or modified by subsequent agreement to be mutually agreed by the parties or by operation of law, and to my mind the words "alter" and "modify" in the collective agreement have no material distinction in meaning with the word "varied" in section 17(2) since altering, modifying or varying an agreement would result in some changes in the original agreement. Now, the first part of section 17(2) governs the period as to when such terms or varied terms shall be implied in the contract, and according to the words used by the legislature, it is limited to the time when the agreement is in force *i.e.* "as from such date and for such period as may be specified in the collective agreement." In this particular agreement the operative period or time frame is specified in article 1(a) and (b) *i.e.* for 3 years with effect from June 1, 1975 to May 31, 1978, and thereafter until terminated by a 3-month notice in writing. Therefore the reading into the contract of service not only the terms but also the varied terms of the collective agreement is only operative from June 1, 1975 until its termination under article 1(b). In my view, the words "unless varied by a subsequent agreement or a decision of the court" are subservient to the operative clause or time frame in the first part of section 17(2). The sub-section does not provide that even outside the time frame *i.e.* after the agreement is no longer in force, the terms or varied terms of the agreement shall continue to be implied in the contract of service and shall continue to be binding notwithstanding the termination of the agreement. Under section 17(2) the variation of the agreement by subsequent agreement or decision of the court can only be effected during the binding period of the agreement as envisaged by the first part of that subsection read with section 14(2)(b), and not after it has been terminated pursuant to section 14(2) (c). Thus, under section 56(1), the complaint must be made when the collective agreement is still operative but not otherwise. As adverted to earlier, the binding period specified for the present collective agreement was three years under article 1(a) and after that for such further period as the party might wish it to continue until terminated by either party by giving three months' written notice under article 1(b). Once so terminated, the agreement effectively ceases to be operative. The words "unless varied by a subsequent agreement or a decision of the Court" in section 17(2) refer to a variation made during the period the collective agreement is still in force. The first part of section 17(2) must be given its ordinary and natural meaning. I am not persuaded that there is any ambiguity in article 1 of the agreement nor in sections 14(2) and 17(2) of the Act. In the absence of ambiguity the argument on purposive approach in interpretation does not really arise. To argue that the first part of the subsection is superfluous or that the word "termination" in section 14(2) (c) is an unfortunate use of the word by the legislature would be going against established principle of construction that there is a presumption against treating any word as surplusage except in obvious case (see *Curtis* v. *Stovin,*[5] *Ditcher* v. *Denison,*[6] and *Cowper Essex* v.*The Local Board for Acton*[7]). As such, section 17(2) does not assist the union. It is true that under article 1, termination of the agreement does not mean termination of employment under the contract of service, but it does mean the termination of terms and conditions of employment as agreed in the collective agreement. In *Duport Steels* v. *Sirs,*[8] in adopting the strict and literal approach in a case involving Industrial Relations legislation, it was held that where the meaning of words in a statute is plain and unambiguous judges should not invent fancied ambiguities merely because they themselves consider that the consequences of giving effect to its plain meaning would be inexpedient or even unjust or immoral. The words used by the legislature in section 17(2) read with section 14(2) are quite plain, and in any event the strict and literal interpretation of that provision in this appeal would not give rise to an absurd and unjust result or situation as envisaged by Lord Denning in *Nothman* v. *Barnet London Borough Council.*[9] When negotiating for a new collective agreement, it may be proper for the parties to agree that certain terms of the new agreement should come into force with retrospective effect.

Turning now to the argument that an award can only be terminated by the Industrial Court, it is necessary to emphasize that there are two types of "awards" under the Industrial Relations Act although the word is defined in section 2 to mean "an award made by the Court in respect of any trade dispute or matter referred to it." The first is an award on terms and conditions of employment and work actually awarded by the court arising from a stalemate in collective bargaining between employers and workmen and their trade union. There is therefore no collective agreement in the first type of award; whereas the second type of award is the collective agreement voluntarily entered into between the two parties but only deemed to be an award under section 17. We are here dealing with the second type of award and

not an actual award made by the court arising from a trade dispute and referred to the court. As such, in this type of award the Industrial Relations Act preserves the freedom to contract by the parties subject only to compliance with the Act and in particular sections 14 and 15. It is open to the parties to include whatever terms they deem necessary to protect their respective rights and interests unless such terms are prohibited by the Act or other written law. Under section 2 of the Act, a "collective agreement" means "an agreement in writing concluded between an employer or a trade union of employers on the one hand and a trade union of workmen on the other relating to the terms and conditions of employment and work of workmen or concerning relations between such parties"; and "collective bargaining" means "negotiating with a view to the conclusion of a collective agreement." In the instant case, the collective agreement has never been refused cognizance by the court under section 16(2)(a) for non-compliance with the provisions of section 14; nor has it been amended by the court under section 16(2)(b). Indeed it has never been the case for the union that the agreement has not complied with section 14 or any other provisions of the Act. Abdul Razak J. is therefore correct in refusing to read into the agreement a continuation clause or saving clause after its termination. The termination of the contract as envisaged in article 1(b) of the agreement just as the word "termination" in section 14(2)(c) of the Act must mean termination pure and simple. From the four corners of the agreement and also from reading the whole provisions of Part IV of the Act on "collective bargaining and collective agreements," I can find no justification in law or in fact for the word 'termination' to mean other than what it ordinarily means, and certainly the word used both in the agreement and the Act cannot mean that the terms of the agreement would continue to be binding notwithstanding the termination of the agreement. Such an interpretation would be absurd since it purports to give special meaning to the word "termination" which the Act and the agreement never intended. Further, in my opinion there is nothing in section 17(2) to suggest that the continuation or saving clause should be deemed as a term in the contract of service notwithstanding its absence in the collective agreement. What is the purpose of section 17(1) transforming a collective agreement into an award by a deeming provision? In my view the purpose is not to dilute further the freedom to contract by the parties, but merely to clothe the agreement with all those statutory provisions in the Act for its enforcement during the agreed period that the agreement should be in force and no further.

Thus the Act not only specifically allows but makes it essential where appropriate for provision to be made for termination of the collective agreement although at the same time it encourages such agreement to continue for as long as possible by providing a minimum period of three years so as to ensure continuity and stability in relations between employers and workmen and their trade unions. It cannot be denied that such policy is in line with the objective of the Industrial Relations Act as any re-negotiation for a completely new collective agreement would certainly run the risk of endangering industrial peace. It is not unreasonable for the parties to intentionally exclude a continuation clause in the agreement. In this context, no improper motive should be attached to the company's conduct in requesting the union to terminate their agreement in accordance with article 1(b) before re-negotiation could commence.

In my view there is nothing in section 17 to suggest that a collective agreement though deemed to be an award cannot be terminated or modified by the parties. Indeed, section 14(2)(c) empowers the parties to prescribe in the agreement the procedure for its modification and as well as for its termination. Thus, a collective agreement though deemed to be an award is capable of being modified or terminated by agreement, and the Industrial Relations Act as it now stands does not prohibit the ordinary law of contract pertaining to modification and termination of contract to be applied. It would therefore follow that once a collective agreement is terminated in accordance with its terms, it ceases to be binding on the parties and under section 17(2) the terms of the agreement should no longer be implied in the contract of service after termination even for the purpose of re-negotiation unless expressly so provided in the agreement itself. Since the Act expressly permits a collective agreement to prescribe for its termination, and pursuant thereto the agreement did so provide for such termination under article 1(b), the effect of the termination by the union would be to bring to an end the rights and liabilities of both parties. In the absence of a continuation or saving clause in the agreement, such a term cannot be implied in the contract of service under section 17(2). In the circumstances, it is my conclusion that Harun J. had committed a jurisdictional error in his interpretation of article 1 of the collective agreement by holding that termination of the agreement under article 1(b) did not terminate the terms of the agreement until replaced by a new collective agreement. Harun

Award was therefore validly quashed by Abdul Razak J. It is inherent in section 56(1) that the complaint to the Industrial Court for non-compliance can only be made during the currency of the collective agreement and not after its termination. As such Harun J. had committed a jurisdictional error not only in the narrow and original sense but also in the wider sense by misinterpreting or disregarding the provisions of sections 14(2) and 17(2) of the Act in interpreting the effect of termination under article 1(b) of the collective agreement.

For the above reasons, I would dismiss this appeal with costs, and the deposit should be paid to the respondent to account for taxed costs.

**Hashim Yeop A. Sani S.C.J.** (dissenting): The appeal is against the order of Abdul Razak J. to quash Award No. 6/81 of the Industrial Court handed down on January 1, 1981. The award was handed down by the Industrial Court presided by Harun J. (hereinafter referred to as the "Harun Court") after hearing an application under section 56(1) of the Industrial Relations Act. Section 56(1) deals with application for non-compliance of any terms of an award or collective agreement. The complaint of non-compliance was in respect of certain provisions of a 1975 Collective Agreement between the parties. The Harun Court held that the Collective Agreement was still in force and ordered the company to restore all the benefits under the Collective Agreement.

Briefly the events in their chronological sequence are as follows. The parties entered into a Collective Agreement on December 29, 1975. The agreement was taken cognizance of by the Industrial Court on March 21, 1976, Clauses 1(a), (b) and (c) of the Collective Agreement read as follows:-

"(a) This Agreement shall be effective and in force for three (3) years from June 1, 1975 to May 31, 1978.

(b) This Agreement shall continue to be in force for a period of three (3) years from the said date *and shall continue thereafter* unless terminated by either party giving three (3) months' *notice in writing to renegotiate* but no such notice shall be given before March 1, 1978.

(c) *During the period of this Agreement,* neither the Company nor the Union shall seek to alter, modify, annul or add to any of its terms whatsoever except by mutual consent or by operation of Law."
(emphasis supplied)

The Union on June 17, 1978 invited the company to negotiate for a new collective agreement. The company replied on July 7, 1979 that it was studying the Union's proposals. Then on July 26, 1978 the company requested the Union to terminate the 1975 agreement first before negotiation. The Union accordingly terminated the agreement on February 4, 1979 apparently on the advice also of the Ministry of Labour.

Then events took a different turn. The company withdrew certain benefits without the consent of the Union. The Union lodged a complaint under section 56(1) of the Act. The complaint was heard on July 26, 1979. The complaint was that the company had withdrawn benefits under article 30 of the Collective Agreement relating to EPF contributions. In Award No. 5/80 handed down by the Industrial Court presided by Mr. Abraham (hereinafter referred to as the "Abraham Court") it would appear to be the opinion of the Abraham Court upon preliminary objection, that since the agreement had expired on May 3, 1979 (*i.e.* three months from February 4, 1979) there could not be any case of non-compliance because there cannot be non-compliance of a non-existent agreement. The Abraham Court made *no order* on the complaint.

Subsequently, another complaint under section 56(1) was lodged by the Union in 1980 for non-compliance of a number of benefits under the same Agreement unilaterally withdrawn by the Company including the EPF benefits under article 30. This time the Harun Court, however, found that the 1975 Collective Agreement was still in force and accordingly ordered the company to restore all benefits under the various Articles of the Agreement which had been abandoned by the company including article 30 of the Agreement dealing with Employees Provident Fund contributions. Abdul Razak J. ordered the Harun Award to be quashed.

Abdul Razak J. dealt with two issues which by their nature go to the question of jurisdiction. First he would seem to have held that the Harun Court had no threshold jurisdiction to hear the Complaint because the complaint had been heard and disposed of by the Abraham Court. He said in his judgment:

"But as the Court had found that there had been no breach of the Agreement, there has therefore been no non-compliance as would require the Court to make any Order against any party. There was a decision however made by the President which was to dismiss the respondent's complaint and section 33(b) expressly provides a decision like an order cannot be appealed against or reviewed."

Secondly he gave an interpretation of Clause 1(b) of the agreement which was diametrically opposed to the construction given to it by the Harun Court. Referring to Clause 1(b) he said:

"The Clause provides that the contract shall cease to have effect after the parties had by three months' notice terminated it. I do not think one can be made to sound any clearer. If it was intended nevertheless that it was to continue to have effect until such time as the parties had formulated a new Agreement as Counsel urged, it is very strange indeed that the parties had not expressly said so in the Agreement."

As a consequence two principal questions arise in the appeal –

(1) Was the Harun Court in 1981 deprived of jurisdiction to hear the application under section 56(1) after Award No. 5/80 was handed down by a differently constituted Industrial Court namely the Abraham Court in 1979?

(2) What is the proper interpretation to be given to Clause 1(a), (b) and (c) of the Collective Agreement?

On the first question, to constitute a *res judicata* an earlier judgment or decision must, in the terms of the Privy Council decision in *Kok Hoong* v. *Leong Cheong Kweng Mines Ltd.*[10] necessarily and with precision determine the point in issue.

*Res judicata* is based on the principle that once a competent authority has decided on a matter in isssue between the parties after a full enquiry the matter should not be permitted to be reagitated. "There are good reasons why this principle should be applicable to decisions of the Industrial Tribunals also" – see *Burn & Co.* v. *Their Employees.*[11]

In my opinion there is no question of *res judicata* applying in the instant case because firstly non-compliance can happen on successive occasions and as many complaints can be made as there are non-compliances. In other words, section 56(1) of the Act cannot be construed so as to limit it only to one complaint of non-compliance. Secondly, in this case Award No. 5/80 expressly made *no order* and for this reason there was in effect no order to be set aside and no order binding on the parties for the award was made under section 56 and not under section 33 of the Act for the interpretation of an agreement. A decision under section 33 of the Act on the interpretation of an agreement shall be binding on the parties as the original agreement.

Abdul Razak J. also referred to section 33B of the Act. In my opinion the object of section 33B is to prevent an award, decision or order of an Industrial Court to be appealable or reviewed on its merits although it may be quashed if it was made without jurisdiction. In the circumstances of this case section 33B is not relevant in the consideration of the jurisdiction of the Harun Court to hear the complaint simply because both the Abraham Court and the Harun Court are of co-ordinate jurisdiction.

Now we come to Clause 1(b) and (c) of the Collective Agreement. It is true that a collective agreement is not a contract in the strict legal sense but here we are dealing with statute law. Section 14 of the Industrial Relations Act is a general provision on collective agreements. Section 17 of the Act is a specific provision on collective agreements which have been taken cognisance of by the court. The two main features of section 17 are:-

(1) A collective agreement which has been taken cognisance of by the court shall be *deemed* to be an award and shall be binding on the parties.

(2) The terms of the collective agreement shall not be varied except by a *subsequent collective agreement* or a *decision* of the Industrial Court. The words "varied by a subsequent agreement" in section 17(2) clearly mean varied by a subsequent collective agreement and not varied by any agreement. The word "decision" in section 17(2) is a decision of the Industrial Court on a reference under section 16 (in a trade dispute) or under section 33 (interpretation and variation of award and agreement) or an order under section 56(2) of the Act (which empowers the Industrial Court to make an order upon special circumstances to vary or set aside any term of a collective agreement).

Thus the words "during the period of this agreement" in Clause 1(c) of the collective agreement must mean the period until the agreement is replaced by another collective agreement or varied by a decision of the Industrial Court and not otherwise. Therefore the purpose of terminating the agreement is to free the parties to renegotiate for new terms. The termination does not by itself abrogate the terms of the existing agreement. The terms of the agreement continued to have effect until a new collective agreement was reached. The use of the term "terminated" in Clause 1(b) may be unfortunate but it is still the only word to describe

the legal fiction where the parties to the collective agreement may be set free to renegotiate for new terms.

The proper approach to the construction of Clauses 1(b) and (c) of the agreement must be such so as to give meaning to the system of collective bargaining between employers and employees. Otherwise it will result in an absurd situation whereby the workers' benefits achieved as a result of collective bargaining will be reduced to nought at the end of every three years when the parties wish to renegotiate for a new collective agreement. Surely that is not the intention of the parties. Surely it is also not the intention of Parliament to allow the benefits enjoyed by the workers for the three years to lapse altogether and the renegotiation to begin from scratch. There must be continuity and stability in the relationship of employers and workmen otherwise there will be chaos in industrial relations. In my view, Abdul Razak J. overlooked these broad objectives of Industrial Relations law when he gave too much emphasis on the technicality of the law of contract of employment. In *United Engineering Workers Union* v. *Devanayagam*[12] Lord Guest and Lord Devlin gave a dissenting judgment on the question whether the office of president of a labour tribunal was not a judicial office within the meaning of section 55 of the Ceylon Constitution but in their dissenting judgment the two law Lords made a pertinent observation on the true perspective of the law of industrial relations in relation to the common law of master and servant. At page 377 the judgment reads:

"It is commonplace that with respect to industrial relations the common law of master and servant has fallen into disuse. Disputes about conditions of employment are not usually settled by the courts in accordance with the terms, express or implied, of the contract of service. Trade unionism could no doubt have used its increased bargaining power to obtain more realistic and elaborate contracts of service within the framework of the old common law, but it preferred to use it to seek advantages irrespective of contract and enforceable not by legal machinery but by the threat of the strike. The law has therefore had to make a new entry into the field of industrial relations. It has had to start again from the beginning, and, as in the field of international relations, has had to make its way in by formulating methods of securing the peaceful settlement of disputes."

The words "as from such date and for such date and for such period as may be specified in the collective agreement" appearing in sub-section 2 of section 17 of the Act should be construed in the context of the section in which they appear. No collective agreement taken cognisance of by the court shall be varied or replaced except by a subsequent agreement or a decision of the court.

Mr. Xavier may have conceded that the collective agreement in this case omitted to include a continuing clause but that does not have any legal effect. It could at best amount to *ex abundanti cautela.*

It is my view therefore that the Harun Court had jurisdiction to hear the complaint under section 56 of the Act and to make Award No. 6/81 and it had not committed any jurisdictional errors in arriving at the award. The appeal should accordingly be allowed with costs and the order of the High Court be set aside. Deposit to the appellant.

*Appeal dismissed.*

Solicitors: *D.P. Xavier & Co.; T.M. Varughese & Co.*

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## GANESAN & ANOR. v. BASKARAN

**[S.C. (Abdul Hamid C.J. (Malaya), Lee Hun Hoe C.J. (Borneo) & Hashim Yeop A. Sani S.C.J.) June 12, & December 27, 1985]**

**[Kuala Lumpur – Supreme Court Civil Appeal No. 286 of 1984]**

*Contract – Sale of land – Restriction in interest – Land not transferable without consent of Ruler in Council – Whether there was oral promise to obtain such consent – Whether condition precedent – Triable issue – Evidence Act, 1950, s. 92.*

*Practice and Procedure – Application for rescission of agreement of sale and forfeiture of deposit – Triable issue – R.H.C. 1980, O.56 r. 2.*

In this case the appellants had agreed to buy land belonging to the respondent and had paid a deposit of $20,000/-. There was a restriction in the document of title that the land could not be transferred without the consent of the Ruler in Council. No such consent was obtained but the respondent applied for the rescission of the contract and the forfeiture of the deposit on the ground that the appellants had failed to complete the transaction and that time was of the essence of the contract. The learned trial judge at first heard the application in chambers and dismissed it. However after hearing further arguments in open court he reversed the decision and allowed the application. He formed the view that time was the essence of the contract and therefore the respondent had properly terminated the agreement and forfeited the deposit. The appellants appealed.

**Held:** (1) the central question that arose for determination in this case is whether the respondent did orally promise that he would obtain the consent of the Ruler in Council necessary for the transfer. There was therefore an issue to be tried;